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No. 96-1358

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARIA M. OCHOA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly disqualified petitioner's application for a radio license based on petitioner's false testimony at the licensing hearing, even though the Commission had not specifically identified petitioner's veracity as an issue to be decided at the hearing.

2. Whether substantial evidence supports the Commission's disqualification decision.

3. Whether petitioner has standing to challenge the award of a radio license to a competitor even though her own application for the license was disqualified because of her lack of veracity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 121a-139a) is unpublished, but the decision is noted at 98 F.3d 646 (Table). The decision of the administrative law judge disqualifying petitioner's application (Pet. App. 10a-50a) is reported at 7 F.C.C. Rcd 1861. The decision of the Review Board affirming that disqualification (Pet. App. 51a-80a) is reported at 7 F.C.C. Rcd 6569. The decision of the Federal Communications Commission also affirming that disqualification (Pet. App. 81a-92a) is reported at 8 F.C.C. Rcd 3135. Decisions of the Commission denying reconsideration (Pet. App. 93a-117a, 118a-119a) are reported at 9

F.C.C. Rcd 56 and 10 F.C.C. Rcd 142. A further decision of the Commission denying petitioner's petition for review (Pet. App. 120a) is reported at 10 F.C.C. Rcd 8746.

JURISDICTION

The judgment of the court of appeals (Pet. App. 121a) was entered on September 23, 1996. A petition for rehearing was denied on November 27, 1996. Pet. App. 140a. The petition for a writ of certiorari was filed on February 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was one of eight applicants for authority to operate a new FM radio station in Lenoir, North Carolina. Under the Federal Communication Commission's broadcast licensing policy then in effect, one of the principal comparative criteria applied was the degree to which any applicant proposed to "integrate" its ownership with the on-site daily management of the proposed station. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395 (1965). In an effort to gain an important comparative advantage under this integration criterion, petitioner pledged in her application to sever her connection with her current employer (broadcast station WMXC in Charlotte, North Carolina) if her application were granted, to move to Lenoir, and to manage the new station full-time.[1]

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[1] While this proceeding was pending before the agency, the Commission's integration policy was struck down in *Bechtel* v. *FCC*, 10 F.3d 875 (D.C. Cir. 1993). Because the Commission did not find it necessary to reach the comparative issues in this case, the *Bechtel* decision is irrelevant here.

The administrative law judge (ALJ) held an evidentiary hearing to consider the competing applications. Petitioner was questioned at the hearing about her promise to move to Lenoir if her application succeeded. She reiterated that commitment and testified that she had informed her coworkers at WMXC of her commitment. Pet. App. 25a-26a. On cross-examination, petitioner denied telling the general manager of WMXC, Jake Gurley, that her real plan was to dismiss her application in return for a monetary settlement, and denied telling Gurley that in the event of a grant of her application she would sell the station and remain at WMXC. *Id.* at 27a. Petitioner repeated her testimony even after she was shown a sworn statement by Gurley in which he contradicted her story. *Ibid.*

Faced with this potentially critical conflict in testimony about conversations between petitioner and her coworkers, the ALJ scheduled an extraordinary hearing session for the taking of rebuttal testimony about petitioner's intention to move to Lenoir if her application were granted. At the rebuttal hearing, Rita Thorne, who succeeded Gurley as general manager of WMXC, testified that she had asked petitioner if she intended to leave WMXC and move to Lenoir if her application were granted, and that petitioner had replied that she did not. Instead, according to Thorne, petitioner had said that she planned to sell the station if she won the license. Pet. App. 28a. Edward Jablonski, who worked under petitioner as local sales manager of WMXC, also testified that petitioner had indicated to him that she did not intend to move to Lenoir, but rather that she intended to be "bought out," and that her real goal was to become general manager of WMXC. *Id.* at 28a-29a. Jake Gurley also

testified, reiterating the statements in his earlier declaration that petitioner had told him that she did not intend to leave WMXC but, rather, planned to dismiss her application in return for a profitable settlement. *Id.* at 30a. Finally, Susan Litaker, WMXC's business manager, testified that she had asked petitioner, in Gurley's presence, why she wanted to go to Lenoir when she had a good job with WMXC. According to Litaker, petitioner replied that she "didn't want to run the Lenoir station, she merely wanted to file the application and sell it." *Id.* at 29a-30a.

Petitioner presented the testimony of four witnesses, who supported her story that she in fact intended to move to Lenoir if she won the station license. Those witnesses did not, however, offer any testimony about the statements that petitioner had made to her coworkers. Pet. App. 30a-31a, 55a. Petitioner also took the stand again at the close of the rebuttal session and revised the testimony that she had given earlier. Whereas previously she had testified that she had told her coworkers of her intent to move to Lenoir and to manage the new station, she testified on rebuttal that she had evasively "cast all her statements in the negative" to them because she had wanted them to believe that she intended to stay at WMXC, so that she could protect her job in the event that her application failed. *Id.* at 31a.

After observing the demeanor of all the witnesses and considering their conflicting testimony, the ALJ concluded that petitioner had deliberately tried to mislead the Commission about her intent to move to Lenoir, and that she was therefore not qualified to be a licensee. Pet. App. 32a. The ALJ stressed that "[w]e are now dealing with a principal who testified

falsely in open hearing." *Ibid.* The ALJ also noted that, although petitioner's opponents had not expressly placed petitioner's character in issue at the hearing, "[a]n implicit character issue exists with respect to the truth and veracity of every witness who is a principal in a hearing case." *Id.* at 33a. While issues are normally designated specifically "to place an applicant on notice of the charges he or she will be required to meet at the hearing[,] * * * notice to an applicant that he or she must testify truthfully and not conceal material information is superfluous," because "[t]hat's what the oath is for." *Ibid.*

2. On exceptions, the Review Board upheld the ALJ's disqualification of petitioner. The Review Board held that the absence of a designated misrepresentation issue did not preclude the ALJ from disqualifying petitioner on the basis of her false testimony at the hearing. The Board observed:

> The Commission has long held that false statements in the course of the hearing process are, in and of themselves, of substantial significance, that specific notice to an applicant that he [or she] must testify truthfully is superfluous, and that such false testimony may lead to disqualification.

Pet App. 58a. Moreover, the Board said, the ALJ placed petitioner on notice that her truthfulness had been challenged and provided her with ample opportunity to address the matter when he established procedures for rebuttal testimony. *Id.* at 58a-59a. The Board emphasized that its affirmance of the ALJ's disqualification decision was not dependent on whether petitioner was truthful or not with her

colleagues about her future plans; rather, the Board explained, "it is based solely on whether she testified candidly at hearing, and the testimony quoted above reveals that she did not." *Id.* at 59a.

The Commission also affirmed the disqualification decision. It rejected petitioner's argument that she could not fairly be disqualified for her misrepresentations absent a previous, formal specification of her veracity as an issue. Pet. App. 83a. The Commission stated that "the absence of formal notice in this instance [that petitioner's truthfulness was at issue] is a mere technicality, as [petitioner] had actual notice that the veracity of her testimony regarding her pertinent comments to WMXC employees was at issue and had ample opportunity thereafter to adduce evidence bearing on that question." *Id.* at 84a. The Commission also affirmed the evidentiary findings of deliberate misrepresentation. *Id.* at 85a-92a.

Following petitioner's disqualification, the license was awarded to the only remaining qualified applicant, Foothills Broadcasting, Inc. The Commission rejected petitioner's attempt to seek review of the grant of the license to Foothills. Pet. App. 120a.[2]

3. In an unpublished decision, the court of appeals affirmed the Commission's decision to disqualify petitioner, and rejected for lack of standing petitioner's attempt to seek review of the award of the license to Foothills. Pet. App. 121a-139a. The court observed that petitioner had had "numerous opportunities dur-

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[2] The ALJ had disqualified Foothills for misrepresenting its ownership structure, Pet. App. 44a-46a, but the Review Board found no intent to deceive or other abusive conduct warranting disqualification, *id.* at 75a-76a. The other applicants were dismissed or disqualified and did not seek review.

ing the course of the proceedings to realize that the candor of her testimony was at issue." *Id.* at 129a. The court also relied on previous case law in which it had held that, under appropriate circumstances, the Commission may disqualify a license application based on the applicant's misconduct, even if the applicant's veracity had not been specifically designated as an issue to be decided at the hearing:

> First, not only must the misconduct occur directly before the agency, but it should be of such a blatant and unacceptable dimension that its existence cannot be denied. * * * Second, although formal notice may not always be necessary, it should be evident that the party has some form of actual notice of the conduct said to be at issue, and must not be prejudiced by surprise. Finally, the party must be given an opportunity to speak in (its) own behalf in the nature of a right of allocution.

Pet. App. 132a (quoting *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 235 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982)) (internal quotation marks omitted).

The court found all three of its *RKO General* conditions satisfied in this case. The court ruled first that there was "substantial evidence" to support the Review Board's finding that petitioner engaged in misrepresentations during the hearing. Pet. App. 132a. Second, the court held that petitioner had actual notice that the veracity of her testimony was being challenged because the ALJ called the extraordinary hearing precisely to resolve the conflict in the testimony "on the issue of what she told her coworkers about her intentions to relocate." *Id.* at 133a. Third, the court emphasized that petitioner had had

an opportunity to speak on her own behalf, at both the original hearing and the rebuttal hearing. *Id.* at 134a.

The court also ruled that petitioner had no standing to challenge the Commission's decision to award the license to a rival applicant. The court agreed with the Commission that "[a]n applicant disqualified from competing for a broadcast license usually lacks standing to appeal the subsequent disposition of that license since, in most cases, no cognizable injury can be demonstrated by such a disqualified applicant." Pet. App. 138a.

ARGUMENT

1. Petitioner argues (Pet. 13-21) that she was denied due process when the administrative law judge (ALJ) disqualified her license application on the basis of her false testimony about her intent to move to the community where the licensee was located. She contends that she was deprived of a fair hearing because the ALJ did not specifically designate her candor in testifying or her character as an issue to be decided at the license hearing. That contention is without merit.

Candor in FCC proceedings is a matter of the highest concern to the Commission. See *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). The Commission has therefore made clear, in a series of decisions, that a license applicant's candor is always an issue in Commission proceedings, and that applicants are therefore on notice that "false statements in the course of the hearing process are, in and of themselves, of substantial significance." *Old Time Religion Hour, Inc.*, 95 F.C.C.2d 713, 719 (1983); see also *Richardson Broadcast Group*, 7 F.C.C. Rcd 1583, 1585 (1992), aff'd *sub nom. Younts* v. *FCC*, No. 92-1119,

1993 WL 185669 (D.C. Cir. May 10, 1993) (noted at 955 F.2d 306) (Table); *William M. Rogers*, 92 F.C.C.2d 187, 189 (1982); *Grenco, Inc.*, 39 F.C.C.2d 732, 736-737 (1973). Cf. *ABF Freight System* v. *NLRB*, 510 U.S. 317, 323 (1994) (noting that NLRB could have disqualified employee from "profiting from the [administrative] proceeding," i.e., from reinstatement and backpay remedies, based on his false testimony under oath); *id.* at 326 (Kennedy, J., concurring) (same).

Petitioner argues that due process required that the ALJ specifically designate her candor in advance as an issue for the license proceeding, so that she could defend herself against the charge of lack of candor. But unlike the cases on which petitioner principally relies—which involved a criminal proceeding (*Cole* v. *Arkansas*, 333 U.S. 196 (1948)), a trial for criminal contempt (*In re Oliver*, 333 U.S. 257 (1948)), and disbarment (*In re Ruffalo*, 390 U.S. 544 (1968))—"[a] denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure." *FCC* v. *WOKO, Inc.*, 329 U.S. at 228. The Commission's purpose in disqualifying applicants who lack candor "is not to punish [them] for past wrongs, but to ensure that [licensees,] fiduciaries of a great public resource[,] will satisfy the highest standards of character commensurate with the public trust that is reposed in them." *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (internal quotation marks omitted), cert. denied, 456 U.S. 927 (1982). And, given the clear FCC precedent that candor is always at issue, all license applicants are on notice that their lack of truthfulness in testifying may provide a basis for disqualification. Accordingly, the "fluid" standards of due process (*RKO General*, 670 F.2d at 232)

do not require that an ALJ expressly designate a licensee's candor as a matter for decision.

Nor was petitioner deprived of a fair opportunity to litigate the issue of lack of candor. Because the ALJ notified the parties that the conflict in testimony between petitioner and Gurley was the matter to be resolved at the rebuttal hearing, petitioner was aware that her credibility was at the crux of the issue to be decided by the ALJ. See Pet. App. 58a-59a (Review Board noting that the ALJ "established procedures for the second phase of the proceeding that clearly placed [petitioner] on notice that her truthfulness was at issue and provided her with ample opportunity to address the matter"). Petitioner had a full opportunity to speak on her own behalf at the rebuttal hearing; she therefore had a fair opportunity to contest the implication, raised by the conflict between her testimony and Gurley's affidavit, that she was testifying falsely.

2. Petitioner argues (Pet. 22-24) that the Commission departed from the "preponderance of the evidence standard" set forth in *Steadman* v. *SEC*, 450 U.S. 91 (1981), when it disqualified petitioner's application based on "inferences" that it drew about her lack of candor. *Steadman*, however, involved the standard of persuasion applicable to a disciplinary proceeding in which the SEC sanctioned an investment adviser for violations of the securities laws, and in which the SEC has the burden of proof. See also *Silver Star Communications-Albany, Inc.*, 6 F.C.C. Rcd 6905 (1991) (applying preponderance of evidence standard in license *revocation* proceeding based on misconduct). In this case, by contrast, the disqualification of petitioner's application was not a sanction imposed on her for past violations, but a conclusion that she was not

eligible to participate in a proceeding to award a license in the future. See *RKO General*, *supra*.

Moreover, even if *Steadman* is applicable here, there is no contradiction between the preponderance of the evidence standard and the ALJ's reaching a conclusion about petitioner's lack of candor based on inferences from conflicting testimony. The ALJ clearly found that petitioner had testified falsely, after reviewing all the evidence in the record; he did not find only that there was substantial evidence to conclude that petitioner had testified falsely. Pet. App. 32a-33a. The Review Board likewise found that "the testimony * * * reveals that [petitioner] did not [testify truthfully]." *Id.* at 59a. Those determinations by the ALJ and the Review Board were then upheld by the Commission and the court of appeals as supported by substantial evidence. *Id.* at 87a, 128a. The case-specific application of the preponderance of the evidence standard by the ALJ and the Review Board raises no legal issue worthy of this Court's review.

3. Petitioner argues last (Pet. 25-30) that the court of appeals erred in concluding that, because her own application had been disqualified based on her lack of candor, she lacked standing to challenge the grant of a license to a rival applicant, Foothills. As the court of appeals correctly concluded, however, petitioner could show no injury traceable to the award of the license to Foothills because her own application could not be considered, based on its disqualification. See Pet. App. 138a. Any decision that a reviewing court might reach about the correctness of the FCC's award of the license to Foothills would have no effect on petitioner's opportunity to apply for the license.

See *Garden State Broadcasting Ltd.* v. *FCC*, 996 F.2d 386 (D.C. Cir. 1993).

Petitioner relies on *Jacksonville Broadcasting Corp.* v. *FCC*, 348 F.2d 75 (D.C. Cir.), cert. denied, 382 U.S. 893 (1965), and *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965), but those cases do not support a different result here. In those cases, the court held that the Commission was obliged to explain a difference in treatment of two applicants or licensees, both of whom had engaged in the *same* misconduct. A finding, in those cases, that the Commission had unfairly applied different standards to the two applicants would have required the court "to overturn *both* the unsuccessful applicant's disqualification and the award of the license to the applicant." *Garden State*, 996 F.2d at 395-396. But in this case, the Commission did not apply disparate standards of disqualification to petitioner and to Foothills, as the court of appeals found. Pet. App. 136a, 139a. Accordingly, petitioner lacks standing to challenge the Commission's decision to award the license to Foothills.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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